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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-332

IN THE MATTER

OF

83RD REALTY COMPANY,
Debtor-Petitioner,

vs.

JAMAICA SAVINGS BANK,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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83RD REALTY COMPANY,

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vs.

JAMAICA SAVINGS BANK,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Statement.

The Petitioner, 83rd Realty Company, a partnership which owns certain property in the State of New York, respectfully prays that this Court grant a petition for a writ of certiorari to review the determination of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York, both of which Courts declined to reverse an order of the Bankruptcy Court for the Southern District of New York, dismissing a petition in

bankruptcy under Chapter XII of the Bankruptcy Act because Jamaica Savings Bank was a member of the Federal Home Loan Bank (11 U.S.C. §917 [1970]).

Opinion Below.

No opinion was rendered by the United States Court of Appeals, but a brief opinion, which is annexed as an Appendix hereto, was written by the United States District Court for the Southern District of New York, per Charles Metzner, U.S.D.J.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. The Court of Appeals for the Second Circuit, in essence, affirmed the District Court's determination and the Bankruptcy Court's determination that a Chapter XII proceeding under the Bankruptcy Act would not lie against Jamaica Savings Bank, on the 30th day of May, 1978.

Questions Presented.

1. Whether Chapter XII of the Bankruptcy Act, Section 517 (11 U.S.C. §917 [1970]), precludes relief to a Debtor which owns real estate with respect to a Creditor who is a member of the Federal Home Loan Bank?

2. Whether Section 517 of Chapter XII of the Bankruptcy Act is constitutional?

3. Whether Section 517 (11 U.S.C. 917) of the Act precludes jurisdiction over a member of the "Federal Home Loan Bank of New York" merely because of such membership?

4. Whether Section 517 of the Act was ever intended to frustrate one of the main purposes of Chapter XII by excluding virtually every bank from its operation?

5. Whether Chapter XII, Section 517 applies to commercial loans altogether?

6. Whether the Bank waived jurisdictional claims by participating in the proceedings for over a year before moving to dismiss?

Constitutional and Statutory Provisions Involved.

The Fifth Amendment of the United States Constitution is involved herein, as well as Section 517 of Chapter XII of the Bankruptcy Act.

Background of the Proceedings.

The Bank is the holder of a first mortgage on the Debtor's real property situate at 8331-116th Street, Kew Gardens, Queens, New York. At the time of the appeal, on information and belief, the Bank maintained that there was an unpaid principal balance of approximately $1,600,000 plus unpaid accrued interest of about $180,000. The total being $1,780,000.

In August of 1976, the Debtor filed its petition for arrangement under Chapter XII of the Bankruptcy Act. On August 25, 1976, Judge Lesser signed an order authorizing the Debtor in Possession to operate and manage the business property.

Following the signing of the order of August 25, 1976, there followed a number of meetings and hearings. It was not until on or about August 8, 1977 that the attorneys for the Bank filed a meaningful motion seeking to dismiss the Chapter XII proceeding and permit the Bank to proceed with a foreclosure action.

The Court below, after hearing argument on August 29, 1977, indicated in the minutes of that day, that he was impressed with the Debtor's attorneys' position that Section 517 of the Act was not intended to apply to commercial loans (S.M. 27, 28—8/29/77). The Court, in essence, asserted *"He may be right on that."* The Court continued (S.M. 28):

> "I don't think that I am prepared to make that finding on this record. I think that I am constrained to hold regardless of what I might think about either plan; that the provisions made within that plan insofar as they apply to Jamaica Savings Bank clearly wind up extending or impairing the obligation held by Jamaica Savings Bank, which is apparently secured against this property.
>
> "That being the case, I don't see how I could regardless of what other findings I was to make under 461 or whether anybody has to vote for a plan, whether a debtor can vote or reject a creditor's plan or any of the other things until somebody is prepared to say that 517 doesn't apply to a commercial loan situation . . . ."

The Bankruptcy Court ultimately entered an order on November 23, 1977, dismissing the Chapter XII proceeding so far as the Bank is concerned.

The Bank took the position that the Bankruptcy Court lacked jurisdiction because the Bank was a member of the "Federal Home Loan Bank of New York".

That Court, in essence, agreed with the Bank that it lacked power to allow an "extension or impairment of any secured obligation held by a member of any Federal Home Loan Bank".

Since the proceedings below, the second mortgagee, Curzon & Company, has succeeded in foreclosing upon the property. We believe that this constituted a great injustice upon the Debtor and we are asking this Court to consider the imposition of an order placing the property back where it was prior to the foreclosure.

In essence, what we are asking is that this matter be placed in *status quo ante* to where it was prior to the order of the Bankruptcy Judge dismissing the Chapter XII proceeding.

We point out that the Debtor would be willing to have the bank, or any other managing agent which the bank might choose, manage the property during further court proceedings, if the foreclosure is rescinded.

The Court of Appeals declined to grant a stay, although it docketed the appeal and then dismissed the appeal on the grounds that it felt that there was no purpose to be gained by further oral argument of the case since it obviously agreed with the lower courts. This determination, however, of the U.S. Court of Appeals was "on the merits" and it is from that determination that jurisdiction to apply to this Court stems, since it constitutes an exhaustion of remedies.

Argument on the Law.

Preliminary considerations.

We ask this Court to bear in mind that it is the position of the Petitioner that the "Federal Home Loan Bank" Act, by definition, was never intended to apply to multiple dwelling commercial property, nor to frustrate jurisdiction of the Bankruptcy Court under Chapter XII where a bank is a creditor. It is not disputed that a large number of banks are members of the Federal Home Loan Bank.

Chapter XII arrangements are available only to individuals who own real property or chattels real, which property is put up as security for a debt. Under §401, the provisions of Chapter XII shall apply exclusively to cases under that chapter. Although numerous provisions in other chapters of the Bankruptcy Act are applicable to an arrangement case under Chapter XII, the converse is not true, and the provisions of Chapter XII do not apply to cases under other chapters of the Act. That does not mean, however, that the provisions of Chapter XII apply to a case only while it is being administered under Chapter XII. For example, under certain circumstances an order may be entered in a Chapter XII case directing either that bankruptcy be proceeded with, in which event the case is thereafter administered in substantial effect under the provisions of Chapters I to VII, or dismissing the Chapter XII case without directing bankruptcy. Several sections in Chapter XII become operative for the first time upon the entry of one or the other of those orders. Those sections have no application while the case is being administered under Chapter XII, but do apply if a case once administered under Chapter XII is thereafter administered under Chapters I to VII or if the Chapter XII case is dismissed without bankruptcy being directed. (See Collier on Bankruptcy [Chapter XII, ¶1.01, etc.]).

The Statute Involved.

Chapter XII, §517 (11 U.S.C. 917):

> "Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto; nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by Home Owners' Loan Corporation or by any Federal Home Loan Bank or Member thereof."

POINT I.

The District Court below, which wrote no formal opinion, erred in ruling that Chapter XII had no applicability to the Bank. In essence, the ruling below frustrates the primary purpose of Chapter XII.

At the outset, it must be borne in mind that Section 517 of Chapter XII (sometimes called the "Act") applies in a narrow and proscribed sense to members of the Federal Home Owners Bank, Federal Home Loan Bank.

It is to be noted that the first part of Section 517 of the Act refers to the fact that the provisions thereof shall not apply to secured obligations insured under the National Housing Act, the actual language being that this Chapter shall not be "deemed to *affect or apply*" to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act.

We do not have that situation here. The only possible provision applicable to the case at bar would have to be governed by the second part of that section which deals with the *"extension or impairment"* of any secured obligation held by the Home Owners Loan Corporation or by any Federal Home Loan Bank, or member thereof.

The statute provides that the Act shall not be deemed to allow any such extension or impairment of any such secured obligation.

If interpreted to a dryly logical extreme, it is obvious that Chapter XII would be substantially frustrated since virtually any bank involved in extending credit in connection with a real estate transaction would be a duespaying member of the Federal Home Loan Bank.

It is difficult to conceive that Congress, in enacting Chapter XII Section 517, would have intended to emasculate the effectiveness of the Act in this manner.

The difficulty herein is exacerbated by virtue of the fact that Judge Lesser did not write a formal opinion setting forth his reasons, although he did discuss the matter on the transcript of a hearing on August 29, 1977, *supra.*

A plan or petition for arrangement was filed in August of 1976 by the Debtor and on August 25, 1976 Judge Lesser signed an order authorizing the Debtor in Possession to operate and manage the business and property.

If, for some reason, the plan was not deemed suitable to Judge Lesser, there might be a reason to request a modification, but that would not require a dismissal of the proceeding entirely.

The Bank (first mortgagee) has argued below in effect, that the Bankruptcy Court lacked power to enjoin a foreclosure of the mortgage because the second clause of Section 517 forbade Chapter XII proceedings to "extend or impair" the obligations of mortgages held by members of the Federal Home Loan Bank.

Secondly, the first mortgagee has argued, in effect, that the plan submitted by the Debtor is not suitable.

Dealing with the first argument, we submit that the Bank is wrong in its interpretation of the statute. Section 517 would essentially frustrate the purposes of Chapter XII in many cases, including the instant one, because in most instances the rehabilitation of the Debtor is impossible without continued possession of the mortgaged premises.

We maintain that Section 517 does not deprive the Bankruptcy Court of jurisdiction to enjoin foreclosures of mortgages held by members of the Federal Home Loan Bank, at least in the absence of evidence that the obligations to the mortgagees have been, or will be, impermissibly impaired. (See Collier on Bankruptcy, 14th Ed., 9:14.02, Chapter XII, Article XIV.)

The facts are not in material dispute so far as the loan that was made by the Bank in connection with the property. What is in substantial dispute, however, is the interpretation of Section 517.

One of the main questions herein is whether the secured obligation of the Debtor to the Bank is totally exempt from this proceeding so that the Bank is entitled to immediate possession thereof.

This question can only be answered by an analysis of Section 517.

In the case of *In Re Consolidation Motor Inns,* 5 Collier Bankruptcy Cases, page 301, etc. (W. D. Georgia, July 16, 1975, W. Homer Drake, Bankruptcy Judge), No. B75-296A, an incisive analysis was written, which we believe was very apt in the case at bar.

At the outset, it is manifest that Section 517 must be construed so as to give effect to the intent of Congress in adopting that Section. If the result of that intent is equal to a repeal of Chapter XII in any viable sense, as has been urged by the Bank, then so be it. But the Debtor maintains that the Bank's interpretation is erroneous.

As Judge Drake opined in *In Re Consolidated Motor Inns, supra,* at 304:

> "The language contained in Section 517 which it is necessary for this Court to interpret to resolve the issue before it is as follows:
>
> '. . . nor shall its provisions be deemed to allow *extension or impairment* of any secured obligation held by Homeowners' Loan Corporation or by any Federal Home Loan Bank or member thereof.' (Emphasis added.)
>
> The above quoted language in Section 517 follows the first part of Section 517 which reads as follows:
>
> "Nothing contained in this Chapter (XII) shall be deemed to *affect or apply* to the creditors of any debtor under a mortgage issued pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto; . . .' (Emphasis added.)
>
> "While the operative words before this Court for construction in the instant case are 'extension' or 'impairment' in the above quoted second part of Section 517, it is obviously also necessary to relate those words to the words 'affect' or 'apply' in the above quoted first part of Section 517. Considered in the abstract, this Court perceives a distinct difference between 'affect' or 'apply' and 'extension' or 'impairment'. The former words contained in the first part of Section 517, in the opinion of this Court, essentially refer to a frame of reference or to relevancy. They are extremely broad and would include any action that relates to the obligations referred to in the first part of Section 517. On the other hand, the words 'extension' or 'impairment' are more restrictive and imply some adverse effect upon the subject. . . .

> "While it is useful to consider the ordinary meanings of the words 'affect', 'apply', 'extension' and 'impairment', it must be recognized that these words are words placed by the Congress in a section of the Bankruptcy Act. As such, they clearly must be considered in a bankruptcy context and to the extent their meaning in that context is different than their ordinary meaning or meaning under some other area of the law, the meaning in the bankruptcy context must necessarily govern in this proceeding."

The Court, in the *Consolidated Motor Inns* case, *supra,* then distinguished *Monte Vista Lodge v. Guardian Life Insurance Company of America,* 384 F. 2d 126 (9th Cir. 1967). The *Monte Vista Lodge* case construes the first part of Section 517 (the same language being a part of Section 263 of Chapter X of the Bankruptcy Act), and does not deal with the second part of Section 517, which is the operative language before this Court, and which language is not contained in Chapter X and, therefore, was not before the 9th Circuit in the *Monte Vista Lodge* case.

In *In re Consolidated Motor Inns, supra,* the Court traces the legislative history of Section 517, and no useful purpose is served by repeating the language of the opinion, which can easily be read by this Court. One important aspect, however, is set forth at page 307 of 5 CBC, where Judge Drake explains:

> "Plaintiff seems to question whether an 'extension' under Chapter XII of the Bankruptcy Act would qualify as a 'plan.' This Court has no doubt whatsoever that a plan under which debts are paid in full but over a longer period of time than would otherwise be required would qualify as a 'plan' under Chapter XII of the Bankruptcy Act. This is true not only because such is the clearly recognized law under various other rehabilitative chapters of the Bankruptcy Act but also because it was clearly the intent of the Congress in establishing Chapter XII

that an extension of time for payment be one of the available courses of action to a debtor. For example, the report to the United States House of Representatives by the House Judiciary Committee on the bill to create Chapter XII includes the following language:

> 'Chapter XII permits the settlement, satisfaction, or *extension of the time of payment* of debts secured by real property or chattels real, including the right to obtain relief under the Bankruptcy Act without the necessity of submitting to an adjudication.' (Emphasis added.) House Report 1409, 75th Congress, 1st Sess. (July 29, 1937).' "

The Court points out that the word "extension" in Section 517 "meaning a plan under which debts are paid in full but over a longer period of time . . .", can only be interpreted as the quoted language indicates.

The word "impairment", however, "does not have a well-recognized meaning in a bankruptcy context."

"Impairment", thus, is defined as Black's Law Dictionary sets it forth, as follows:

> "To weaken, to make worse, to lessen in power, diminish, or relax, or otherwise affect in an injurious manner." at p. 885.

No final plan or arrangement was approved and, in any event, there is no indication in the record from the Court below that a final determination was made on any arrangement or plan.

The Debtor, we maintain, has been unjustly removed from possession, but would not even object to having the Bank, or a Managing Agent for the Bank, manage the property, so long as a stay is granted and so long as the arrangement proceedings under Chapter XII can be carried on. This has not, however, been done.

As Judge Drake indicated in the *Consolidated Motor Inns* case (5 CBC at 308):

> "This Court is without authority to assume in the absence of evidence that a secured creditor is being adversely affected or suffering harm as a result of an order restraining him from foreclosing on security. See *Kaplan v. Anderson*, 256 F. 2d 416 (5th Cit. 1958) and *In re General Stores Corp.*, 147 F. Supp. 350 (S. Dist. N. Y. 1957). Also see *In re Atlantic Steel Products Corp.*, 31 F. Supp. 408 (E. Dist. N. Y. 1939) and *In re Bermec Corp.*, 445 F. 2d 367 (2nd Cir. 1971)."

The Court, furthermore, in *Consolidated Motor Inns, supra,* noted that the legislative history leading up to the adoption of the second part of Section 517 does not support the proposition that Section 517 requires a complete exemption of secured obligations, and the security behind those obligations, with respect to members of the Home Loan Bank.

It is a cardinal principle of statutory construction that courts should give to statutes meanings in accordance with the intent behind the passage of the statutes, and should avoid unjust or absurd results (*Sorrells v. United States,* 287 U. S. 435).

In some instances, this may even require giving certain words meanings different than their ordinary or apparent meaning (*Knapp v. McFarland,* 462 F. 2d 935 [2 Cir. 1972]; *Wirtz v. Allen, Green & Associates, Inc.,* 379 F. 2d 198 [6th Cir. 1967]).

In interpreting the Bankruptcy Act, and particularly the various rehabilitative chapters contained therein, ". . . the courts have almost universally recognized that the statute

should be liberally construed so as to accomplish said rehabilitative purposes" (5 CBC 309; 6 Collier on Bankruptcy 0.11 at p. 11).

In *In re Consolidated Motor Inns, supra,* the Court further explained why it could not view the second part of Section 517 as supporting an exclusion and exemption of persons similarly to the Bank herein; thus at 310 of 5 CBC, the Court asserted:

> "As has been discussed above, the words 'extension' or 'impairment' have a distinctly different and narrower meaning than the words 'affect' or 'apply'. In light of this difference, this Court does not believe it is reasonable to interpret the presence of the conjunction 'nor' connecting the two parts of Section 517 to require that the broad exemption arguably afforded by the first part is necessarily included in the second part. The Court could understand the Plaintiff's construction of the presence of the conjunction 'nor' if the exemption afforded by the second part was broader than the exemption afforded by the first part. However, the opposite is the case here."

See also, *In re Hall Associates,* 8 CBC 290 (E. D. Pa. 3/22/76, Emil F. Goldhaber, Bankruptcy Judge, No. 75-1286).

POINT II.

The lower Court erred in failing to grant a stay as requested. This Court should impose a stay so as to render any decision on appeal meaningful.

This Court is aware, of course, that the Courts below interpreted Section 517 as mandating a dismissal of the proceeding so far as the Bank was concerned. They refused, moreover, to even grant a stay. Perhaps the Courts below were of the opinion that it was improper to grant a stay. In the case of *In re Hall Associates, supra,* however, 8 CBC at 292, the Court aptly explained:

> "We construe the legislative intent to have been, not to broaden the effect of 'affect or apply', but to restrict the effect to 'extension or impairment.' While the petitioner contends, in essence, that any stay against foreclosure constitutes an 'extension or impairment' of its secured obligation, we do not so construe the temporary restraint which prevails in the case at bar. While a stay of *unlimited* duration might well be construed to constitute an 'extension and impairment' of the obligation due the petitioner, a temporary stay should not be so construed: *In re Jersey Island Packing Co.* (CCA9), 138 F. 625; *Continental Illinois National Bank & Trust Co. v. Chicago R. I. & Pac. Ry.,* 294 U. S. 648, 676, 681; especially since we are mindful of the fact that the debtor has proposed a plan to its creditors which must shortly be acted upon. The acceptance or rejection of that plan will have an immediate effect on the temporary stay imposed on the petitioner.
>
> "To summarize: With respect to secured obligations insured under the National Housing Act, the first portion of §517 broadly mandates that the provisions of Chapter XII shall not 'affect or apply' to such obligations. However, with respect to secured obligations held by members of the Federal Home Owners' Bank, the restriction is narrowed to proscribe any 'extension or impairment' of such obligation."

See also, *Matter of Nevada Towers Associates,* 14 CBC 146, S.D.N.Y. 8/10/77, Roy Babitt, B. J., No. 77 B 1170, where the Court also indicates that a stay is consistent with procedings under Chapter XII.

The Debtor has expressed willingness to permit the Bank, or a Managing Agent approved by the Bank, to manage the property during the pendency of a stay.

Section 428 of the Act and Rule 12-43(a) indicates that where the lack of a stay would end any possibility of the Debtor's rehabilitation and the Mortgagee would not be crucially harmed, the Court should properly grant the stay (see Collier on Bankruptcy, 14th Ed. 4A:70.39, 9:4.16).

We submit that the Bank has not demonstrated why it would be irreparably damaged by a stay, especially where it or its designee would manage the property during a stay. Without the stay, obviously, the entire purpose of the Act is frustrated.

Injunctive relief will be granted even absent a showing of probable success where there are serious questions going to the merits sufficient to litigate. See *Triewasser & Katz v. A, T & T,* 535 F. 2d 1356, 1359 (2 Cir. 1976); *Sonesta International Hotels v. Wellington Associates,* 483 F. 2d 247, 250-251 (2 Cir. 1973); *Gulf & Western Industries v. Great Atlantic & Pacific Tea Company,* 476 F. 2d 687, 692-693 (2 Cir. 1973).

POINT III.

The interpretation placed upon Section 517 of Chapter XII deprives Debtor of the equal protection of the laws and deprives him of property without due process. Debtor urges that the Federal Home Loan Bank was never intended to apply to commercial property.

The effect of the action of the Courts below, in essence, precludes the Debtor from any meaningful relief under Chapter XII. The whole purpose of that Chapter is to protect non-corporate debtors which own realty.

Virtually every bank is a member of the Federal Home Loan Bank, since presumably, by merely paying dues, one remains a member. It is submitted, however, that as *In re Consolidated Motor Inns* suggests, it is only when the United States itself has an interest in the case or property, that the provisions of Section 517 should be invoked.

The adoption of the Bank's position in this proceeding would lead to the possibiiity that the Debtor could apply for a conversion of this Chapter XII proceeding, which is designed to deal with both secured and unsecured debts, to a Chapter XI proceeding, which is not designed to deal with secured debts of any kind.

> "Surely, the Congress did not intend that Section 517 of Chapter XII be construed in a manner to create such a possibility. The same would be true in regard to Chapter XIII . . . which cannot deal with debts secured by real property. This possibility would be created because the second part of Section 517 is not present in any other rehabilitative chapter of the Bankruptcy Act" (*Consolidated Motor Inns, supra,* 5 CBC at 314).

The Bank would have the Court remove the possibility of any individual or partnership having available a rehabilitation opportunity in those instances in which secured obligations are held by Federal Savings and Loan Associations. Thus, this would violate the Equal Protection Clause of the Constitution. It would also, in essence, be depriving Debtor of the Due Process of Law because of the "Pickwickian" interpretation of the lower Court on Section 517.

We would ask this Court to seek to determine how the mere membership of the Bank in the Federal Home Loan Bank, *ipso facto,* affects this mortgage in the first place, and how it is in any way prejudiced by being made subject to the provisions of Chapter XII.

As will be shown in the next Point, the Bank waived this jurisdictional question, if it exists at all, and it was merely an afterthought to raise the question of Section 517.

It is obvious, we maintain, that the Federal Home Loan Bank, which is mentioned in the Section along with the Home Owners Loan Corporation, that the statute was meant to apply to one and two family homes, and not to commercial property at all. As the interpretation stands now, Section 517 emasculates Chapter XII altogether.

POINT IV.

The Bank, in essence, waived any jurisdictional complaints and "consented" to jurisdiction, even assuming *arguendo*, that Section 517 were applicable in the case at bar.

As we have pointed out previously, it was not until mid-1977 that the Bank sought to divest the Bankruptcy Court of jurisdiction by claiming that the provisions of Section 517 of Chapter XII mandated dismissal as against them.

The Bank, however, did not move when the petition was filed on August 25, 1976, but waited until the following year before making a motion under 517 of the Act.

Under Rule 915(a), unless a party objects to the Bankruptcy Court's jurisdiction in an adversary proceeding by motion or answer, whichever is first served, the party consents to such jurisdiction (Collier on Bankruptcy, 14th Ed., 13:915.03).

In the case of *In Re APCL & K, Inc.*, E. D. Pa., 8/31/77, 14 CBC 157 [No. 77-2483 per Emil F. Goldhaber, B. J.], the Court ruled that it was necessary, *"as a matter of law"*, that a defendant must object to the Bankruptcy Court's jurisdiction "'at the first opportunity', when it filed its original answer . . .". (*In Re APCL & K, Inc., supra,* 14 CBC at 159).

Because of the importance and aptness of this case to the instant Point and this Brief, we shall deal with the case in greater detail.

In said case, a proceeding was started by the Trustee, under Rule 701 of the Rules of Bankruptcy Procedure. On January 17, 1977, the defendant filed its answer, responding solely to the merits, and not challenging the Bankruptcy Court's jurisdiction. On February 9, 1977 (a far shorter time than that involved in the case at bar), the defendant amended its answer and, for the first time, challenged the Bankruptcy Court's jurisdiction. Judge Goldhaber, in denying the motion to dismiss, explained as follows (14 CBC at 158, 159):

> "The defendant cites three cases: *In Re Los Angeles Trust Deed and Mortgage Exchange* (CCA9), 464 F. 2d 1136 (1972); *In Re Perspectron* (CCA7), 422 F. 2d 576 (1970); and *Gill v. Phillips* (CCA5), 337 F. 2d 258 (1964), in support of its asserted right to file a moratory jurisdictional challenge. We hold the principles enunciated by these cases to be outdated and hence, inapposite.
>
> "On October 1, 1973, by order of the United States Supreme Court, new Rules of Bankruptcy Procedure became effective. Included among these rules is Rule 915(a) which succinctly provides that

'. . . a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objections by a timely motion or answer, whichever is first served.'

"And the Advisory Committee's Note leaves no doubt as to the intent of this Rule:

'The premise of subdivision (a) is that a party to any controversy being litigated in the bankruptcy court must object to the court's jurisdiction at the first opportunity in order to avoid being deemed to have consented thereto . . .'

"*In Re Dunne* (D. C. R. I.), 407 F. Supp. 308 (1974), the adversary proceeding was for reclamation and the plaintiff did not raise the jurisdictional issue until the case was on appeal. Said the Court

'A review of the record disclosed that the plaintiff failed to raise this objection either in its answer to the counterclaim or by motion. According to Rule 915(a) Rules of Bankruptcy Procedure, failure to raise such objection to the bankruptcy court's summary jurisdiction constitutes a waiver of that objection.' "

Finally, the Court emphasized:

"It follows, then, as a matter of law, that the defendant's failure to object to this court's summary jurisdiction 'at the first opportunity,' *i. e.*, when it filed its original answer, constitutes a consent to said jurisdiction."

We submit that the foregoing very recent incisive opinion amply supports the Debtor's position that the Bank has waived any jurisdictional claims, even assuming, and certainly without conceding, that such claims are viable.

POINT V.

We believe this appeal presents a question of first impression as to whether Section 517 applies to commercial property; whether it is constitutional; whether it conflicts with the intent of Congress in enacting Chapter XII; and whether the Bank waived any possible jurisdictional claim by not asserting it promptly.

We have detailed, in the preceding Points, the substance of the Point Heading herein.

We wish to emphasize that a perusal of the very few cases that could be found interpreting and explaining the second part of Section 517 of the Act, reveals that there is apparently no constitutional analysis of its viability, particularly as applied to the case at bar.

Chapter XII was obviously designed to grant rehabilitative relief, as is set forth in the cases of *In Re Consolidated Motor Inns, supra,* and *In Re Hall Associates, supra,* in a context not offered by any of the other Chapters of the Bankruptcy Act.

Since banks are frequently involved in secured transactions involving real property, and many of those banks are no doubt dues-paying members of the Federal Home Loan Bank, it is obvious that any interpretation such as that by the Court below, which declares Chapter XII inapplicable to any bank merely because it is a member of the Federal Home Loan Bank, would essentially frustrate and emasculate the congressional intent in enacting this legislation.

In addition, persons in the position of the partnership constituting the Debtor herein, are obviously deprived of, and denied, protection of a rehabilitative nature under the Bankruptcy Act.

The Court below also reasoned that it could not even grant a temporary stay for fear that such a stay would violate the Act by constituting an allegedly prohibited "extension or impairment" of the secured obligation. We have pointed out, however, and cited cases, *supra,* indicating that this reasoning is fallacious.

We are, of course, asking this Court for both a temporary and permanent stay.

The context of the statute, moreover, refers in the second clause of Section 517, to the Home Owners' Loan Corporation, or Federal Home Loan Bank. This Court necessarily must realize that the Congressional intent could not have intended to include multi-dwelling commercial property within its purview, since otherwise the statute would give virtually no protection in any meaningful sense.

Conclusion.

The petition for certiorari should be granted and the foreclosure rescinded.

Respectfully submitted,

IRVING ANOLIK,
Attorney for Petitioner.

APPENDIX.

Memorandum by Metzner, D. J.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN THE MATTER
of
83RD REALTY COMPANY,

Debtor.

No. 76 B 1922

METZNER, D. J.:

The debtor appeals from an order of Bankruptcy Judge Lesser's dismissal of his petition for arrangement under Chapter XII of the Bankruptcy Act, 11 U.S.C. §§ 801-926 (1970).

The first mortgagee is the Jamaica Savings Bank, which is a member of the Federal Home Loan Bank. It held a mortgage on the multi-unit apartment complex owned by the debtor. It moved for dismissal of the debtor's petition citing the second clause of Section 517 of the Bankruptcy Act, 11 U.S.C. §917 (1970). That section provides:

> "Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the

> National Housing Act and Acts amendatory thereof and supplementary thereto; nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by Home Owners' Loan Corporation or by any Federal Home Loan Bank or Member thereof."

The bankruptcy judge found that none of the various plans submitted by the debtor during the fifteen months from the date it filed its petition could be approved under Section 517, since they all extended or impaired the mortgage held by the bank. Dismissal of the petition followed, since it was found that the debtor has been given "an exorbitantly reasonable amount of time to come up with a program to save its investment in the property and had been unable to do so."

On appeal, the debtor argues that the bankruptcy judge erred in holding that Section 517 applied to the proceeding. It asserts that the section should not apply to multi-unit dwellings and that the bank should be required to show actual prejudice.

Appellant's argument that Congress could not have intended Section 517 to apply to this mortgage is premised on nothing more than appellant's view of how the Bankruptcy Act should be written. Appellant cites absolutely no evidence, factual or historical, to permit speculation that the terms of Section 517 were intended to have anything other than their manifest import. Moreover, appellant fails to demonstrate that the section "frustrates" or "emasculates" the purposes of Chapter XII beyond the fact that it disqualifies appellant's various proposals. There is absolutely no basis for reading into the limitation a restriction to one- or two-family homes, as the debtor urges, or to require a showing of prejudice.

Appellant's constitutional argument is equally conclusory and unsupported by statutory or case authority, and merits no discussion.

Finally, erroneously characterizing the issue as one of jurisdiction, appellant asserts that the bank waived any objection to the court's approval of the proffered plans by not raising Section 517 as a bar earlier in the proceeding. Clearly, a plan could not be found to extend or impair the mortgage, and therefore be deemed unapprovable under Section 517 until it was submitted to the bankruptcy court. There was no waiver by the bank.

The order is affirmed.

So ordered.

Dated: New York, N. Y.
April 14, 1978

CHARLES M. METZNER
U.S.D.J.

Order of Court of Appeals.

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of May, one thousand nine hundred and seventy-eight.

IN THE MATTER

of

83RD REALTY COMPANY,

Debtor-Appellant,

v.

JAMAICA SAVINGS BANK,

Appellee.

78-8158

It is hereby ordered that the motion made herein by counsel for the appellee by notice of motion dated May 16, 1978 to dismiss the appeal from the United States District Court for the Southern District of New York for frivolousness be and it hereby is granted.

A. DANIEL FUSARO,
Clerk
By EDWARD I. GUARDANO
Staff Attorney

HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. WALTER E. HOFFMAN
District Judge

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirtieth day of May, one thousand nine hundred and seventy-eight.

IN THE MATTER

of

83RD REALTY COMPANY,

Debtor-Appellant,

v.

JAMAICA SAVINGS BANK,

Appellee.

78-8158

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated May 11, 1978 for a stay be and it hereby is denied.

It is further ordered that the motion for leave to docket the appeal be and it hereby is granted.

A. DANIEL FUSARO,
Clerk
By EDWARD I. GUARDANO
Staff Attorney

HON. HENRY J. FRIENDLY
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. WALTER E. HOFFMAN
District Judge